



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 4, 1998

Ms. Nancy K. Matchus
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR98-2607

Dear Ms. Matchus:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 119124 and 119418.

The City of Austin received various requests for information concerning the Brushy Creek sewage spill. You assert that the information at issue is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You submitted to this office the records at issue, marked as to the applicable exceptions from disclosure. We have reviewed your arguments and markings.¹

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city asserts that litigation is reasonably anticipated because: "Nancy Matchus, Assistant City Attorney,

¹We note that it was not clear from your letters whether you sought to assert section 552.103 for all of the records, with section 552.107 and 552.111 simply as alternative arguments for some documents. However, your letters also explained that you had marked each document to show the specific exceptions asserted. The documents submitted were separated out and marked specifically to show that you seek to withhold some from disclosure under section 552.103, while others were marked as excepted from disclosure under sections 552.107 and 552.111. Thus, we address the applicability of only those exceptions you have marked for the documents.

has attended several meetings where individuals who were exposed to crypto sporidium have threatened litigation, including a class action lawsuit by all individuals who got ill from the crypto." We note that this sentence appears to be your entire section 552.103(a) argument to this office.

In Open Records Decision No. 452 at 4 (1986), this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. [Citations omitted.]

Litigation has been found to be reasonably anticipated when an individual has hired an attorney who demands damages and threatens to sue the governmental entity. Open Records Decision No. 551 at 2 (1990). However, when an individual on several occasions publicly states a threat to sue, this alone does not show that litigation is reasonably anticipated. Based upon the information you provided to this office, that some individuals at public meetings have verbally threatened litigation, we cannot conclude that the city has shown the applicability of section 552.103(a) to the records at issue. The records for which you assert section 552.103(a) may not be withheld from disclosure.

You marked other records as protected from disclosure under sections 552.107(1) and 552.111 of the Government Code. Section 552.107(1) protects from disclosure information that reveals client confidences to an attorney or that reveals the attorney's legal advice, opinion, and recommendation. *See* Open Records Decision No. 574 (1990). Section 552.111 excepts interagency and intraagency communications from disclosure only to the extent that they contain advice, opinion, or recommendation for use in the governmental body's policymaking process. *Open Records Decision No. 615 at 5 (1993).*² However, neither section 552.107(1) nor section 552.111 protect from disclosure information that is basically a factual recounting of events. *See* Open Records Decision No. 574 at 5 (1990). We have marked the information that we agree may be withheld from disclosure under sections 552.107(1) and 552.111.³ The remaining information must be released.

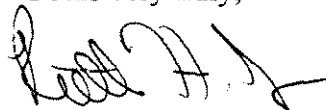
We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

²We note that your letter discusses the applicability of section 552.111 to drafts of documents, but that none of the records you marked as excepted from section 552.111 appear to be drafts of final documents.

³We note that you marked a number of documents as excepted from disclosure under section 552.301 as advice and opinion. We assume that you intended to assert section 552.111 for these documents, as section 552.301 describes the procedure for requesting a decision from this office.

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 119418, 119124

Enclosures: Submitted documents

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